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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent.

PATRICK BRUCE GORDON,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General
WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Counsel for Petitioner

24pp

(CAPITAL CASE)

QUESTIONS PRESENTED

Does 21 U.S.C. section 848 and *McFarland v. Scott* create a separate "post conviction proceeding" that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?

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ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent.

PATRICK BRUCE GORDON,

Real Party in Interest.

Arthur Calderon, Warden of California State Prison at San Quentin, and Daniel E. Lungren, Attorney General of the State of California [hereinafter "The State"], respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case in which Patrick Bruce Gordon is the Real Party in Interest [hereinafter "Gordon"].

OPINION OR JUDGMENT BELOW

The order and opinion denying the petition for writ of mandamus were filed on February 21, 1997. The order and opinion are reported at 107 F.3d 756 (9th Cir. 1997). The petition for rehearing was denied on April 16, 1997. The published amended order and opinion of the United States Court of Appeals for the Ninth Circuit

denying the petition for rehearing is not yet reported. Copies of both decisions are contained in the appendix to this petition for writ of certiorari.

STATEMENT OF JURISDICTION

The State timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 16, 1997.

CONSTITUTIONS, STATUTES OR REGULATIONS

21 U.S.C. section 848(q)(4)(B) provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5),(6),(7),(8), and (9).

21 U.S.C. section 848(q)(8) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion by the defendant, each attorney so appointed shall represent the defendant throughout every subsequent state of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals,

> applications for writ of certiorari to the Supreme Court of the United States, and all available post conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

21 U.S.C section 848(q)(9) provided in pertinent part as follows:

> Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, . . . the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore . . . .[1/]

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 21 U.S.C. section 848(q)(B) and 21 U.S.C. sections 2251 and 2254. The jurisdiction of the circuit court of appeals was invoked pursuant to 28 U.S.C. section 1651 and Rule 21 of the Federal Rules of Appellate Procedure.

On May 3, 1985, real party in interest PATRICK BRUCE GORDON was sentenced to death in California

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1. This section has since been amended to limit the ex parte proceedings. The Ninth Circuit held in this case that the amendments did not apply to cases in which fee requests were filed before April 24, 1996. Without conceding its correctness, the State is not challenging that holding.

for the December 18, 1983, robbery-murder of William Camp Wiley.

On June 21, 1990, the California Supreme Court affirmed Gordon's death sentence. *People v. Gordon,* 270 Cal.Rptr. 451 (1990).

On July 5, 1991, Gordon filed a request in the district court for appointment of counsel pursuant to 21 U.S.C. section 848. Gordon had never filed a petition for writ of habeas corpus in state court. On December 31, 1991, and April 3, 1992, respectively, the district court appointed counsel and co-counsel for Gordon.

On October 23, 1992, Gordon filed a petition for writ of habeas corpus containing over 80 claims, of which approximately 60 were unexhausted.

On April 14, 1993, Gordon's federal court attorneys were appointed to represent Gordon in any state court habeas corpus proceeding.

On April 28, 1993, the California Supreme Court denied Gordon's request for investigative funds for state collateral proceedings.

On May 4, 1993, pursuant to local rule, the district court stayed the federal proceedings to allow Gordon to exhaust state remedies.

On June 28, 1993, Gordon raised the federal question in this case by invoking 21 U.S.C. section 848 to request investigative funds from the district court.

On June 27, 1994, and July 25, 1994, the district court found that it had jurisdiction to consider the investigative funds request even though Gordon's federal action had been stayed for purposes of exhaustion. *Gordon v. Vasquez,* 859 F.Supp. 413 (E.D. 1994). App. C.

On September 19, 1994, the state filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals requesting that the two district court orders of June 27, 1994, and July 25, 1994, be vacated.

On November 15, 1994, the district court vacated its previous orders, struck the petition filed on October 23,

1992, and reactivated the federal action so that Gordon could ask for funds under 21 U.S.C. section 848 pursuant to *McFarland v. Scott,* 512 U.S. 849 (1994). App. D & E.

On November 30, 1994, petitioner filed an amended petition for writ of mandamus asking that the November 15, 1994, order be vacated.

On February 21, 1997, the Ninth Circuit filed an order and opinion denying the petition for writ of mandamus. App. B.

On April 16, 1997, the Ninth Circuit Court of Appeals filed an order and amended opinion denying the petition for writ of mandamus and holding that the district court had jurisdiction to grant 21 U.S.C. section 848(q)(9) request even though the district court had dismissed the petition for containing unexhausted claims. App. A at p. 11 & App. B.

SUMMARY OF ARGUMENT

This Ninth Circuit case raises an important question about the meaning of the "post conviction proceeding" created by Congress in 21 U.S.C. section 848 for state capital defendants seeking habeas corpus relief under 21 U.S.C. section 2254. *McFarland v. Scott,* 512 U.S. 849 (1994). The Ninth Circuit Court of Appeals followed *Rose v. Lundy*, 455 U.S. 509 (1982) to hold that a so-called "mixed petition" (a petition containing unexhausted claims) must be dismissed. However, the Ninth Circuit also held that the dismissal of the petition does not mean that the "post conviction proceeding" under 21 U.S.C. section 848 has been dismissed. Thus, even though a petitioner has filed a mixed petition and that petition is dismissed, the petitioner may still secure investigative funding even while returning to state court to exhaust.

By proclaiming that a separate "post conviction proceeding" survives the dismissal of a mixed petition, the Ninth Circuit created a "two-tiered" habeas proceeding which permits federal courts to exercise jurisdiction over cases when the petitioners are in state court exhausting claims. It has overextended the law and logic of *McFarland* in which this Court held only that Congress intended section 848 to create a "post conviction proceeding" in the "preapplication" phase of a habeas corpus proceeding under 28 U.S.C. section 2254. Given the language of 21 U.S.C. section 848, this "Gordon" jurisdiction would extend to the appointment and payment of counsel for exclusively state court proceedings such as competency and clemency as well as the payment of reasonably necessary expenses, including staying state collateral proceedings if necessary.

The Ninth Circuit's opinion raises troubling questions of federalism since it permits federal courts to hover over state court proceedings by intruding and

interfering with those proceedings through the counsel appointment and fee request processes. The opinion also conflicts with the decisions of other circuits. An orderly and efficient review process requires a separation and clear demarcation between state and federal habeas proceedings. Since the Ninth Circuit's opinion misapplies *McFarland* to obliterate this distinction, review should be granted.

SUMMARY OF REASONS FOR GRANTING THE PETITION

This case concerns the scope of the "post conviction proceeding arising under [28 U.S.C] section 2254" [hereinafter "section 2254"] created by 21 U.S.C. section 848 [hereinafter "section 848"]. This "awkwardly misplaced . . . statutory afterthought . . . ," contained within the Anti-Drug Abuse Act of 1988 in the Food and Drug Code provides for pre-petition appointment of counsel and investigative expenses for "post conviction proceedings" arising under 28 U.S.C. section 2254, the federal habeas corpus statute for review of state convictions. *Sterling v. Scott,* 57 F.3d 551, 557 (5th Cir. 1995). The Ninth Circuit has now held that the "post conviction proceeding" in 21 U.S.C. section 848 extends beyond the "preapplication phase" in a section 2254 proceeding into the "post-dismissed application phase."

In *McFarland v. Scott,* this Court held that the pre-petition filing of a request for appointment of counsel initiated a "post conviction" proceeding. In this case, the Ninth Circuit extended *McFarland* to hold that the subsequent dismissal of a mixed petition under *Rose v. Lundy* does not preclude a district court from still granting requests for investigative fees under 21 U.S.C. section 848(q)(9). Relying on *McFarland,* the intermediate appellate court held that the filing of a motion for appointment of counsel under section 848 creates a

separate "post conviction proceeding" that survives the dismissal of a mixed petition. App. A at 11.

Now, Ninth Circuit courts will continue to exercise jurisdiction over capital cases even though the habeas petitioners have returned to state court for exhaustion. These district courts will still have jurisdiction to authorize funds under section 848 even if the petitioner is in state court litigating and investigating claims for presentation to state courts. Such investigations could continue under the auspices of the "post conviction proceeding" in lieu of the petitioner returning immediately to state court to exhaust. Federal courts will be able to stay executions during that time or even while state collateral proceedings are pending under 28 U.S.C. section 2251.

Prior to the enactment of section 848, federal habeas corpus proceedings were traditionally initiated with the filing of an application or petition for writ of habeas corpus. *McFarland v. Scott,* 512 U.S. at 857 fn. 3. In *McFarland,* this Court held that the filing of a request for appointment of counsel initiated a "post conviction proceeding" under section 2254 prior to the filing of an actual petition. This Court construed section 848 as creating a right to appointed counsel prior to the filing of petition for writ of habeas corpus. In this Court's view, this interpretation was necessary to give practical meaning to section 848's provisions for appointment of counsel and investigative services. *Id.* at 855.

However, this Court in *McFarland* did not reach the issue of whether this "post conviction proceeding" continued once an actual petition had been filed. *In re Joiner,* 58 F.3d 143, 144 (5th Cir. 1995). Nor did this Court construe section 848 as creating a basis for jurisdiction separate from the habeas corpus petition under section 2254.[2/]

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2. In that sense, the "post conviction proceeding" should be no

Yet, the Ninth Circuit has now elongated *McFarland* to hold that a "post conviction proceeding" continues in existence in district court even after the dismissal of a mixed petition. The section 848 "post-conviction proceeding" does not merge with the section 2254 proceeds when the application is filed, but continues on a separate track.

In Gordon's case, the court held that a district court could still grant a request for funds under 21 U.S.C. section 848(q)(9) despite the dismissal of a petition containing unexhausted state claims. Thus, the Ninth Circuit took the limited "pre-application post conviction proceeding" recognized by this court in *McFarland* and expanded it into an overarching, ongoing federal court proceeding independent of any proceedings related to a pending state or federal habeas corpus petition. In doing so, the Ninth Circuit explained that district courts may disburse federal funds under section 848(q)(9) after a

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different than a proceeding under the All Writs Act. That Act does not create any separate independent jurisdiction. *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 77 (D.C. 1984); *see also FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). In fact, this Court held in *McFarland* that section 848 refers to the "precise 'habeas corpus proceeding'" discussed in 28 U.S.C. section 2251, which applies to habeas corpus proceedings under section 2254. *McFarland v. Scott,* 512 U.S. at 858. This Court went out of its way to explain that section 848 granted a right to counsel and services in "any [federal] post conviction proceeding." *Id.* at 854 [brackets in original]. Furthermore, this Court noted that the purpose of the section 848 appointment was a critical part of the "preapplication phase of a habeas corpus proceeding. . . ." *Id.* at 855. In the recently enacted Antiterrorism and Effective Death Penalty Act, Congress reiterated this difference by specifically providing that the new period of limitations for commencing habeas corpus proceedings would be based on the filing of an application for a writ of habeas corpus, not the filing of a request for appointment of counsel. 28 U.S.C. §§ 2244(d)(1), 2263 (amd. 4/24/96); Pub. L. 104-132, tit. I, §§ 101, 106, 107(a); 110 Stat. 1217, 1220, 1223 (1996).

petition has been dismissed and has not even limited the power of a federal court to continue disbursing such funds even if a petitioner is exhausting claims in state court.

Notwithstanding some procedural maneuvering by the district court, the actual history of Gordon's case is simple. Gordon was sentenced to death on May 3, 1985. He was represented by counsel on appeal. *People v. Gordon,* 270 Cal.Rptr. at 455. Although a state habeas corpus process was available in 1990 and Patrick Gordon's attorney, the California State Public Defender, considered filing a state habeas corpus petition -- Gordon did not pursue a state collateral remedy. *In re Clark,* 21 Cal.Rptr.2d 509, 520, 542, 550-551 (1993). Instead, after finishing direct review, Gordon filed a request for appointment of new counsel in district court. A request for investigative funds was denied on the ground that the funds request related only to unexhausted claims. In 1992, Gordon still filed a petition containing 80 claims including 60 unexhausted claims. Rather than dismissing the petition, the district court used a local rule to stay the federal case while Gordon returned to state court to exhaust. In preparation for exhaustion, Gordon secured appointment of his new counsel in state court, but his request for investigative funds was denied by the state court.

Gordon then made the move which lead to this current litigation. Even though the district court had "stayed" the federal proceeding, Gordon returned to federal court in 1993 and requested funds under section 848 to finance his investigation leading to the filing of his state court habeas corpus petition. Ultimately, in 1994, the district court held that even though the petition contained unexhausted claims which petitioner was going to litigate in state court, the district court had the power to authorize funds under section 848 since the federal proceedings had only been stayed, rather than dismissed.

Gordon v. Vasquez, 859 F. Supp 413 (E.D.Cal. 1994). App. C. The State commenced mandamus proceedings.[3/]

Ultimately, the Ninth Circuit Court of Appeals correctly held that the district court should have dismissed the petition under *Rose v. Lundy,* rather than simply staying the federal proceedings. Thus the appeals court invalidated the local district court rule that authorized a stay of proceedings rather than dismissal of the petition for exhaustion.

However, the Ninth Circuit then went on to hold that under section 848(q)(9) and this Court's decision in *McFarland* the district court could still entertain a fees request since the request was authorized in any "post conviction proceeding" under section 848 and because a "post conviction proceeding" had been commenced in this case by counsel's request for appointment of counsel. In other words, a "post conviction proceeding" under section 848 survived the dismissal of a mixed habeas corpus petition. The district court still had jurisdiction to entertain and grant investigative expenses requests even though further proceedings in the case would be occurring in state court. 21 U.S.C. §§ 848(q)(8), 848(q)(9). The district court's decision authorizing a fees request even during the pendency of state court proceedings remained intact. *Gordon v. Vasquez, supra*. App. C at pp. 10-12.[4/]

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3. The district court then tried to moot the writ litigation by "striking" the petition and reactivating the federal proceedings even though Gordon had not exhausted his claims. The district court used the pretext that *McFarland v. Scott* now permitted the court to turn the clock back to 1992 to permit Gordon to investigate unexhausted claims. App. D & E. The State amended its mandamus petition to challenge this maneuver. The Ninth Circuit's decision did not need to reach this issue once it found that dismissal of a mixed petition did not end the "post conviction proceeding."

4. Thus, the district court has more power than it would have if it simply stayed a proceeding under the abstention doctrine.

The Ninth Circuit's creation of a parallel post conviction proceeding overshadowing the proceedings for a habeas corpus petition and hovering over state court exhaustion proceedings is unsupported by any authority and is contrary to the principles of comity and federalism underlying our concurrent federal-state court system. It raises the spectre of duelling, conflicting jurisdictional battles between the state and federal court system. This opinion conflicts with every other circuit court interpretation of *McFarland* and section 848. The Ninth Circuit opinion transforms the federal collateral process from a procedure which centers on the application for a writ of habeas corpus into a procedure in which the petition is simply a procedural event in an ongoing federal funding proceeding.

McFarland did not compel this result. In that case, this Court confronted last-minute "execution eve" litigation in which a defendant had not had the opportunity to pursue state collateral relief with a lawyer. *McFarland* recognized a "preapplication" statutory right to appointment of counsel and reasonably necessary funding in a case in which a petitioner was unrepresented in state court and did not have the opportunity to pursue state collateral relief. *McFarland* created a concomitant right for a district court to stay state court proceedings in this process under 28 U.S.C. section 2251. This Court explained that an attorney and other services "may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland v. Scott,* 512 U.S. at 855. Nothing in *McFarland* indicates that Congress intended the "preapplication" "post conviction proceeds" to continue beyond the filing of the petition.

Compare, Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88-89, fn.14 (1975); *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 243 (9th Cir. 1989).

In this case, however, Gordon had a lawyer on state appeal who was available to pursue state collateral relief, but did not. He had counsel appointed in district court who had been able to research and identify issues resulting in the filing of a petition containing 80 claims which had to be dismissed because of 60 unexhausted claims. Yet, according to the Ninth Circuit, that dismissal does not end the federal action. The Ninth Circuit, no matter how it characterizes the procedural posture of Gordon's case, has now recognized a "post dismissed application" proceeding under sections 848 and 2254. It has extended the *McFarland* "post conviction proceeding" beyond what was envisioned by either this Court or by the Congress. *See also Sterling v. Scott,* 57 F.3d at 457.

Gordon conflicts with every other decision that has considered the scope of the "post conviction proceeding" created by section 848 and *McFarland*. *Turner v. Johnson,* 106 F.3d 1178, 1182-1183 fn.8 (5th Cir. 1997) (*McFarland* "concerned only with the period of time between the habeas petitioner's motion for appointment of counsel and the filing of the initial petition . . . ."); *Sterling v. Scott,* 57 F.3d 451, 457 (section 848 does not create a right to appointed counsel in state proceedings nor to a right to have a federal petition held in abeyance during exhaustion since section 848 should not be invoked until completion of state court processes); *In re Joiner, 58 F.3d* at 44; *Steffen v. Tate*, 39 F.3d 622, 624 (6th Cir.1994); *In re Parker*, 49 F.3d 204, 209 (6th Cir. 1995) (distinguishing *McFarland* and rejecting indefinite stays of execution); *Shaw v. Delo*, 971 F.2d 181, 187-188 (8th Cir. 1992); *Hill v. Lockhart,* 992 F.2d 801 (8th Cir. 1993); *Wainwright v. Norris,* 836 F.Supp. 619, 621 (E.D. Ark. 1993); *McKinney v. Paskett,* 753 F.Supp. 861 (D.Id. 1990); *Coleman v. Vasquez,* 771 F.Supp. 300, 304 fn. 5 (N.D.Cal. 1991); *United States ex rel. Whitehead v. Page,* 914 F.Supp. 1541 (N.D. Ill. 1995) and cases cited therein; *In re Lindsey,* 875 F.2d 1502 (11th Cir. 1989); *see also Christy v. Horn,*

___ F.3d ___, 1997 W.L. 296402 (3rd Cir. 1997) (f. 6/5/97) (court must dismiss mixed petition rather than hold petition in abeyance unless execution is "imminent").

Thus, no other court has held that the section 848 appointment of counsel forges a federal action distinct from the habeas corpus action. By making this distinction, the Ninth Circuit has failed to "observe the principles of federalism." *Sterling v. Scott,* 57 F.3d at 457. The survival of the section 848 action permits intrusion of the federal courts into the state court process. "It is not too difficult to see that the hand of the federal court may well find its way further into state court proceedings and the independence of state courts unnecessarily interfered with and compromised thereby." *Ibid.* (describing section 848(q)(4)(B) as a "statutory stepchild").

The implications of this new and indefinite "post conviction proceeding" in which the district court appoints counsel and disburses federal funds even when no petition is pending in federal court are serious. The potential for district court interference may be gleaned from the original district court opinion in this case. That district court found that even though Gordon filed a "mixed petition" and his federal proceedings were stayed, the court still had jurisdiction under section 848 to entertain requests for investigative funds. It found jurisdiction to consider the fees request even though Gordon had never pursued state collateral remedies prior to initiating his post conviction proceeding in district court. The district court also explained that it retained jurisdiction in the case "to protect a litigant's federal rights [under section 848] during the pendency of state court proceedings." App. C at p. 11. Thus indicating that the court could intervene in or stay state court processes if it so deemed necessary and even if no petition was pending before it.

Ominously, the district court also held that the plain meaning of section 848 directed the appointment and payment of counsel for state competency and

clemency proceedings by the district court even though those proceedings ordinarily occur in state court. The district court interpreted section 848 as commanding "that appointed counsel represent the defendant in all post-petition proceedings without regard to forum." *Gordon v. Vasquez,* 859 F.Supp. at 418 citing *Hill v. Lockhart,* 992 F.2d at 803; *cf. In re Lindsey,* 875 F.2d 1502, 1506. App. C at pp. 17-18. None of these powers or eventualities are affected by the Ninth Circuit's holding.[5]

The Ninth Circuit's concept of a free-floating post conviction proceeding untethered to any cognizable claim for relief will only contribute to increased confusion and chaos in the litigation of capital cases. Petitioners such as Gordon, dissatisfied with the ongoing processes in state courts, will retreat to a concurrent district court haven for refuge. This side-by-side state-federal litigation will cause further delay and obstruction of state processes. Inevitably, state courts, state executives, and federal courts will be drawn into conflicts that will only hamper the states' ability to enforce their lawful judgments.

Gordon's case implicates this Court's role as moderator of conflicts between our state and federal court systems. Recently, this Court reiterated dual goals of promoting a "cooperative judicial federalism" among the federal and state courts and of reducing the potential waste of "time, energy, and resources" when these concurrent systems collide. *Arizonans for Official English v. Arizona,* ___ U.S. __, 117 S.Ct. 1055, 1073 (1997). "Comity" between the state and federal courts precludes federal courts from "hovering" over state courts. *Cf. Deakins v. Monagan, 484 U.S. 193, 203 (1988).* When it comes to the unique procedure by which federal courts review state criminal convictions in habeas corpus, both

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5. California also provides for the appointment of state counsel in clemency and competency proceedings. *In re Clark,* 21 Cal.Rptr.2d at 550-551.

this Court and the Congress have tried to minimize "unnecessary conflicts" and "friction" between the co-equal state and federal courts. *Rose v. Lundy,* 455 U.S. at 513-518; *In re Blodgett,* 502 U.S. 236, 239-240 (1992). The Ninth Circuit's Gordon decision sets federal courts and state systems on a collision course.

The section 848 tail now wags the section 2254 dog. The Ninth Circuit has misinterpreted *McFarland* and the congressional intent of section 848. This Court should grant certiorari and hold that the dismissal of a mixed petition also terminates the "post conviction proceeding under section 2254" authorized by section 848(q)(4)(b).

CONCLUSION

For the foregoing reasons, the State requests that the petition for writ of certiorari be granted.

Dated: June 24, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General

WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

WAC:led